

**N COMMISSION OF TIPPECANOE COUNTY
ORDINANCE COMMITTEE
MINUTES OF PUBLIC MEETING**

DATE.....May 20, 2003
TIME.....4:30 P.M.
PLACE.....COUNTY OFFICE
BLDG.
20 N. 3RD STREET
LAFAYETTE IN 47901

MEMBERS PRESENT

Jan Mills
Karl Rutherford
Steve Schreckengast
Mark Hermodson
Gary Schroeder
Jack Rhoda

STAFF PRESENT

James Hawley
Sallie Fahey
Kathy Lind
Jay Seeger, Atty.

Jan Mills called the meeting to order.

I. APPROVAL OF MAY 7, 2003 MEETING MINUTES

Jack Rhoda moved to approve the minutes from May 7, 2003. Karl Rutherford seconded and the motion was carried by voice vote.

II. PROPOSED ORDINANCE AMENDMENT OF A CHANGE TO THE USE TABLE BY ALLOWED BREEDING OF LAB ANIMALS IN OR AND I DISTRICTS BY RIGHTS:

Kathy Lind reminded the Committee that at the last Ordinance Committee meeting, Sallie Fahey proposed this change to allow laboratory animal farms in OR and I districts, to including rats, mice, rabbits and guinea pigs. She mentioned that the change was pretty self-explanatory.

Sallie Fahey asked for clarification on the proper SIC code.

Kathy Lind stated the amendment was copied directly from the current ordinance.

Karl Rutherford asked if currently they were not permitted in OR.

Kathy Lind responded that currently it is only allowed by special exception in A, AA and AW.

Karl Rutherford asked if it could be by special exception in any district, why do they want it by right in OR and I.

Kathy Lind replied that this is an industrial type of use and it makes sense.

Karl Rutherford asked if this was an animal factory.

Sallie Fahey replied affirmatively.

Kathy Lind stated that it was different than a cat or dog breeding farm. She mentioned that this has to be a very clean environment therefore it is more of an office research or industrial use.

James Hawley mentioned that it was a good question as to why it could not be a special exception in the Office Research District.

Karl Rutherford stated that with a special exception, everyone would have the opportunity to weigh in. He said that there might be some places that are inappropriate. He mentioned that a large part of Wabash Township was in OR and there were some parts that were inappropriate.

Kathy Lind asked if they wanted it by special exception in OR and by right in I or by special exception in both.

Karl Rutherford stated that he wanted to raise the question and have discussion on it. He said that he favors having it be a special exception in OR. He stated that he did not understand why it would be appropriate in all categories when it is by special exception in A, AW and AA.

Sallie Fahey pointed out that in A and AW it is more likely that there would be residential neighbors and more of a reason to have it by special exception. She stated that houses were not allowed in OR, I1, I2 or I3.

Jan Mills asked if this amendment would allow it in NB.

Several members responded negatively.

Karl Rutherford stated that he was in favor of permitting it in the I districts and by special exception in OR districts.

Sallie Fahey pointed out that if this is a large factory operation, AA doesn't make much sense.

Karl Rutherford agreed with Sallie Fahey and asked if other restrictions applied.

Kathy Lind stated that it has to be on sewer and water because of the amounts of water generated.

Gary Schroeder asked how large of an operation this would be.

James Hawley stated that he did not have any actual numbers on the size of the operation. He said that the facility would have to be of a substantial size as well as clean.

Jan Mills asked if there was a consensus to have a special exception in OR, by right in the I districts and eliminate the AA.

The committee agreed.

Jack Rhoda moved to send the amendment, including the changes to special exception in OR and elimination of AA, to the full Area Plan Commission. Karl Rutherford seconded and the motion passed by voice vote.

III. CONTINUED DISCUSSION ON RE DEVELOPMENT STANDARDS

Sallie Fahey stated that before detailed work begins in the body of the ordinance they should reach a decision on the comments in Joanna Grama's memo. She said that there are two options in section 5.13.2 (h) on how to deal with rural estate subdivision roads when they are at the back of an existing development with an existing easement. She said that those options only address the pavement standards and do not address the problem of the easements. She pointed out that legal counsel determined that any question regarding an existing easement is beyond the authority of the Plan Commission. She said that determination affects using either version of (h). She stated that regarding easement questions, she believes there are 2 choices:

- RE rezones and subdivisions can continue to be approved as infill developments using existing easements to reach them. The potential consequences include the Plan Commission and/or County Commissioners could be involved in legal action by the existing homeowners for having approved the rezone or subdivision using the homeowners' easement for access to the new development and potentially having land zoned RE that the landowner couldn't use. She recapped that this situation would entail the homeowners taking action against the use of their easement and winning, resulting in an RE zone that could not be used. The Plan Commission along with help of legal counsel needs to decide how much risk is involved and whether the risk is legal, financial or public relations. She said that a determination should be made as to whether the risk is manageable or worth the benefits.
- The second choice would be that no land would be eligible for RE zoning and subdivision approval if the land can only be accessed through an existing easement. She said that in this option the risk is eliminated but would also cause the elimination of infill development and a lot of prime sites would be unuseable.

Karl Rutherford stated that if there is an easement that satisfies the discussed requirements and everyone agrees, there is no concern. He said that someone who does not already have an easement couldn't be forced to give one. He stated that the developer of the RE can either give a bona fide easement or he can't.

Sallie Fahey stated that in a new development it would be a matter of obtaining a bona fide outlot. She said that the question is if the developer has a right to use an existing easement. She pointed out that the dissertation from Joanna Grama stated that the Commission did not have a right to explore that question. She said that if the Commission does not have a right to determine if that easement can be used for additional developments, then they are left with these two problems.

Karl Rutherford pointed out that if someone in the subdivision did not want the developer to use the easement, they could request that it not be used or take the developer to court.

Sallie Fahey pointed out that the APC could also be taken to court for approving additional developments using a private easement.

Karl Rutherford said that the APC would not be approving the use of the easement, they would be approving additional development contingent on obtaining permission from the easement owners. He stated that there is a definite distinction between the two approvals.

Sallie Fahey said that there may be that distinction, but Joanna Grama's dissertation stated that the Commission was not allowed to ask those questions. She explained that the Commission does not have any way of knowing whether the developer has a right to use it or not.

Jack Rhoda said that the APC could not stipulate approval upon receipt of permission.

Sallie Fahey stated that is her interpretation of the legal opinion.

Steve Schreckengast asked if the APC or County would be in jeopardy for approving a rezone at the end of a private road, even though approval was not granted for use of that road.

Jay Seeger stated that it might not expose the County to liability, but open it to litigation. He pointed out that in the beginning the underling grant of easement use is not known. He said that if a piece of property is rezoned and its only access is a private easement, it could interfere with the owner's rights. He said that a rezone on its own does not necessarily create a problem, but the logical conclusion is that the rezone will be used for the intended purpose and that puts

the APC in the middle of the situation. He explained that ultimate liability may not be attached to the APC, but they would still be in the middle of the problem.

James Hawley pointed out that if the APC is asked to approve a subdivision that complies with the rural estate subdivision standards, and the easement issue can not be addressed, the APC might still be required to approve the subdivision and be immediately in jeopardy of litigation.

Gary Schroeder pointed out that this issue would probably be presented at the public hearing of the rezone, when the owners stepped up to speak or complain.

James Hawley stated that might or might not happen.

Mark Hermodson pointed out a previous case where a petitioner claimed he had the right; until Sallie Fahey presented evidence that he did not.

Sallie Fahey stated that particular example was easily determined, but most cases are not so easily understood. She said that even with documentation present, the question is whether or not legal counsel should address the issue during the approval process.

Steve Schreckengast stated that in that case, the question is what type of proof should be required. He asked if legal counsel would make a determination based on documents provided by the property owners claiming they have the rights.

Jay Seeger explained that if all the grantors and beneficiaries of the easement have created an outlot to be used as access, then the easement has been eliminated.

Steve Schreckengast asked what the issue would be if the property owner presented a document that stated they owned the rights, what burden of proof would they be required to present. He asked if the property owners would have to obtain a court ruling that states they have access.

Patrick Cunningham, Vester and Associates, 309 Columbia Street, stated that one of the problems with easements is overburdening. He said that overburdening an easement only occurs when the courts decide that it occurs. He said that an attorney or property owner cannot claim an overburden has occurred. He suggested that to limit liability for the APC, notification to all people on the easement should be required during the rezone and subdivision process. He said that the wording should indicate that the easement would be addressed at the public hearing. He pointed out that it might not eliminate a ruling of overburdening, but might lessen the liability of the APC.

Daniel Teder, suggested adding exemptions that list easement issues that have not been addressed.

Karl Rutherford asked for clarification that the issue at hand was concerning access through something that is already built. He stated that the specifics have already been determined for new construction.

James Hawley replied that was correct.

Karl Rutherford asked how people that are already living there could be warned.

Daniel Teder explained that an existing easement is being used to access another piece of ground behind it. He said that if the APC cannot look at issues of easement use, accessibility or overburdening, they should issue a warning saying these items have not been addressed and they can continue at their own risk.

Jay Seeger mentioned that Daniel Teder's suggestion would only address half of the problem. He explained that suggestion would protect the APC from a developer claiming ignorance, not from the property owners.

James Hawley mentioned that there might be an issue of an easement that becomes a covenant on the property and the use of that covenant is a taking. He said that in court cases in Tippecanoe County the municipality was liable because of the taking of private property rights.

Karl Rutherford said that when two RE developments are created together, the roads have to be made to a specific standard. He asked why that standard should be lowered for access through something that is existing. He stated that he thought that had been addressed through the wording. He pointed out that if the wording were incorrect then the RE that is behind an existing development would have to be accessed in some other way.

Steve Schreckengast asked Jay Seeger if he agreed with Joanna Grama's opinion that improvements off-site could not be forced. He said that the essence of her opinion was that the APC could not force the improvement of a road that was not part of the subdivision.

Jay Seeger stated that was true. He said the question is who owns it.

Steve Schreckengast stated that his opinion is that the Commissioners should decide whether the access road is adequate for the proposal. He said that if the road is not adequate, they should deny the petition.

Jack Rhoda pointed out the APC could do the same thing.

Steve Schreckengast said that the APC could make a negative recommendation, but it is ultimately the County Commissioners who have the final say.

James Hawley pointed out that would force the APC to approve the subdivision.

Steve Schreckengast stated that they did not have to approve it.

Several members replied that if it meets the standards, it must be passed.

Sallie Fahey stated that at the October meeting there were three options presented: the first was that it can't be done if utilizing someone else's easement; the second was the entire easement would have to be converted to an outlot as per the standard for a new RE; and the third option, which everyone agreed on at the time, was that the road would have to be improved, but could stay in an easement.

Karl Rutherford stated that permission would still be needed from all of the property owners of that easement.

Sallie Fahey stated that it was at that point in the discussion when they asked Joanna Grama for a legal opinion. She said that it was Joanna Grama's legal opinion that the APC did not have the right to ask the property owners for permission to use the easement because they could not explore the pedigree of the easement.

Karl Rutherford reiterated that when the first development was created, the easement was set out and each of the property owners owned to the middle of the road. He said that any change to that would have to come from a consensus of all of the property owners. He mentioned that property owners might agree to that if one of the benefits was improvement of the road.

Sallie Fahey mentioned that the change would involve the property owners agreeing to sell their half of the land under the easement to the developer in order for the developer to create an outlot.

Karl Rutherford stated that the simplest solution would be for the developer to buy the rights to the easement.

Sallie Fahey reiterated that back in October, that solution was option number 2. She said that the consensus was that it was too burdensome on the developer, so the concentration was shifted to option 3 which required the road improvement, but not the conversion to an outlot.

Karl Rutherford agreed that option 3 was a workable solution, but not at the taking of property owners' rights.

Jack Rhoda pointed out that they are back to option 1.

Sallie Fahey pointed out that the comments by Daniel Teder, Pat Cunningham and Jay Seeger could become something that could minimize the risk involved with infill developments. She said that if that is the case the next determination would be what documentation would be required and should that be included in the amendment. She explained that until those issues are decided, the discussion is at a stand still.

Patrick Cunningham stated that the public perception is that if the APC approves something, it must be ok. He said that option three is a good option, except that the easements should be removed and not just used. He pointed out that people are more willing to grant an easement than they are to convey land for an outlot. He mentioned that the outlot ends up in the hands of a homeowners association that the owners might or might not want to join. He stated that it is less difficult for the owners to agree to grant an easement with the condition of upgrading the road.

Steve Schreckengast pointed out that it is a typical condition that any mortgage holder has to agree to release the easement. He suggested having a condition in the RE subdivisions requiring all the property owners on the easement sign off on it.

James Hawley pointed out that a mortgage release is not a release of easement.

Steve Schreckengast stated that it is an acknowledgement that they are allowing it to be recorded on the property that they have a mortgage on.

James Hawley pointed out that they are allowing the property to be dedicated for other public uses.

Steve Schreckengast mentioned that it was a similar concept to have a property owner sign an acknowledgement that the easement is going to be used for another purpose.

Patrick Cunningham said that whether there is a new easement or they require an affidavit from the landowners agreeing to that, there should be some affirmation that they do not see it as an overburden.

James Hawley pointed out that it could not be instant ownership, it would have to be carried in the chain of title.

Jay Seeger mentioned that there have been rezones approved that are in violation of an existing real estate covenant. He said that it is not the role of the APC to determine those covenants. He stated that it is a similar situation that anyone who has the benefit of the easement would have to consent. He pointed

out that an affidavit would not work because it would have to continue to run with the land from that point forward and would have to be a new covenant.

Patrick Cunningham mentioned that would not be needed at the time of rezoning, but should be clarified at the subdivision stage.

James Hawley stated that it has to be explicitly written in the subdivision ordinance that it is a requirement of filing the subdivision.

Karl Rutherford mentioned that it would be difficult to require it at the time of the rezoning because of the possibility of it being turned down.

Sallie Fahey pointed out that the sketch plan is filed at the same time as the rezone, so by the time the rezone is approved, the first step of the subdivision process is already completed.

James Hawley stated that it could become enough evidence in the rezone process for the Commission to recommend denial.

Jay Seeger said they would have to find a technical violation in order for them to deny the request.

James Hawley stated that it would have to be explicitly put in the subdivision ordinance so that it would be a required standard in order for the subdivision to be approved.

Steve Schreckengast asked if it could be a condition of the subdivision.

James Hawley explained that it could not be a condition, it would have to be a direct requirement.

Steve Schreckengast posed the question that if there were 7 homes on a road that accessed 20 homes in the back, would permission be needed from only the 7 owners, or everyone in the subdivision.

Jay Seeger said that it would just be for the benefit of the people along the easement.

Jan Mills asked for a consensus to allow Jay Seeger and Sallie Fahey to work on an amendment.

Steve Schreckengast asked if that was something Jay Seeger would normally draft.

Jay Seeger explained that what they were currently referring to was the language of the amendment for the UZO and USO. He said that in addition to the

amendment there should be a checklist for the developer, as per Daniel Teder's suggestion.

James Hawley pointed out that the developers would not be personally liable; it would be the County by way of the APC.

Steve Schreckengast suggested requiring the developer to sign a hold harmless agreement, before the subdivision was recorded.

Jan Mills stated that the consensus is to look at option 3, with new language.

Sallie Fahey asked for confirmation that they wanted to use the easement notion and it would not have to be converted to an outlot. She suggested reviewing everything again to ensure everyone was in agreement. She pointed out that under (h) there was still a decision to be made as to what kind of standard to which it has to be improved. She stated that under (2 b) the following language would be added to the last sentence " and various County offices, County Assessors records regarding tillable and non-tillable assessments and notarized affidavits from current and past land owners."

James Hawley stated that the APC has aerial photos from 2000, the MITS department has aerial photos from 1997, and so the petitioner would only have to obtain one additional set from an outside source.

Sallie Fahey reviewed the changes and additions to sections (2 e) and (2 f). She read an e-mail from Mark Ablers, the County Highway Director, dated March 13, 2003, requesting that each RE subdivision have only one access RE road and that it be long enough to handle all the lots.

Steve Schreckengast asked if there was a 30-acre corner lot with a road that accessed it from one road and exited on another road.

James Hawley mentioned that was a similar example to Gregg Sutter's Gray Mare development.

Sallie Fahey pointed out that Steve Schreckengast was referring to a through road.

James Hawley asked what specific standard should be put into the ordinance to make it safe.

Steve Schreckengast mentioned that most of the discussion centers around only having one-way in and out.

James Hawley stated that situation would create a short cut.

Steve Schreckengast pointed out that roads connect all subdivisions that are in town.

James Hawley explained that is because it is a denser situation and there should be more emergency vehicle access.

Sallie Fahey stated that she could discuss that option with Mark Albers.

James Hawley gave an example of another proposal from Gregg Sutter in which he was requesting additional accesses as opposed to the single access.

Patrick Cunningham asked if the changes they were currently reviewing were for the UZO or USO.

Sallie Fahey pointed out that many of them would have to be made in both, but the current text is from the USO.

Patrick Cunningham stated that it could be in the USO in a manner that would allow a variance to be sought, but once it is in the UZO it creates an additional burden.

Sallie Fahey stated that they would look into that and speak to Mark Albers. She used the chalkboard to review additional concerns listed in the email from Mark Albers. She said that instead of something that gave a minimum cul-de-sac length for an RE road, the problem is where the driveways enter that road and where they are in relationship to the public road access. She proposed the language "vehicular access onto a rural estate road shall be prohibited for the first 200 feet measured from dedicated public road right-of-way." She explained that it does not prohibit a lot from being there, it prohibits where the driveway for that lot is. She pointed out an example of this on the chalkboard.

Steve Schreckengast asked for clarification on the example on the chalkboard.

Sallie Fahey stated that the language might have to be adjusted.

James Hawley pointed out that the lots have to be at least 2 acres and 200 feet deep.

Several members acknowledged that statement.

Sallie Fahey stated that in theory they could be as small as 30,000 square feet.

Brian Keene asked if it could be adjusted to allow one driveway within 200 feet on each side of the road. He explained that if there was a lot that was 150x300, no driveway would be allowed.

Sallie Fahey stated that question would have to be discussed with Mark Albers.

Steve Schreckengast stated that the flagpole lots are a bad idea. He said that it is a public safety issue.

James Hawley pointed out that access adjacent to the County Road was an unsafe design from the beginning.

Sallie Fahey asked if she should discuss the topic of one driveway within 200 feet with Mark Albers.

Jan Mills replied yes, to find out what his thoughts were.

James Hawley pointed out that in Steve Schreckengast's earlier example of a through road, if it were a public road then the public would be using it to drive through the subdivision instead of around it.

Steve Schreckengast pointed out that subdivisions are encouraged to be connected.

Sallie Fahey reviewed the two choices in section (2 h). She mentioned that whatever language she and Jay Seeger write, might need to be inserted at this point.

Steve Schreckengast stated that he thought that (i) could not be required by the APC. He said that as per Joanna Grama's memo, they could not require off-site improvements.

Sallie Fahey stated that she understood Joanna Grama's memo as stating they could not force the conversion of the easement or address the pedigree of the easement.

Jay Seeger stated that Joanna Grama's memo did not address off-site improvements.

James Hawley explained that Joanna Grama's opinion was that the way the ordinance is written now, they could not force the requirements on the easement leading to the rural estate subdivision. He said that putting it in the ordinance makes it a requirement.

Sallie Fahey explained that Joanna Grama's opinion was saying the way the ordinance is currently written it could not be required. She pointed out that this was option three back in October. She said that based on the discussion at the March 18th meeting, she added another option, on page 6 of the handout. She read this option from the handout and explained that it could not be done on

gravel but could be done on a paved road. She mentioned that she purposely left out standards on paving.

Steve Schreckengast asked if a private easement would have a public right-of-way.

Several members replied only where it meets the County Road.

Sallie Fahey demonstrated this example on the chalkboard. She stated that it would have to be to County standards, including pavement, width, acceleration-deceleration lanes and passing lanes. She said that is all based on the number of dwellings that create trips in and out of the development.

Steve Schreckengast asked if it would be more appropriate to say “the private street within the right-of-way of the public road” instead of the public right-of-way.

Sallie Fahey replied affirmatively. She said that if the developer of the RE subdivision still owns all the lots and still controls the easement, then there is not any reason it can not be converted to an outlot. She stated that in that case, the entire section from the public road through the parcelization and into the RE subdivision would be in an outlot and built to standard.

Jay Seeger agreed to that statement and recapped the conditions applied to that situation.

Steve Schreckengast stated that he preferred option 2 for section h. He asked if there should be a standard applied to pavement and at what point would the pavement be required to be completed.

Sallie Fahey stated that it does not meet this requirement unless it is paved before the RE comes to the APC for approval. She pointed out on the chalkboard where the paved road would have to be.

Steve Schreckengast asked what would happen if the zoning was denied.

Jack Rhoda replied that the zoning was already done by that point.

Sallie Fahey stated that it would have to be done before the preliminary plat filing. She said that the preliminary plat is after the rezone. She pointed out the risk in approving a subdivision before the paving is done.

Patrick Cunningham stated that once a developer has all the approvals for a project, the next step is to go to the bank for funding. He said that if it were a substantial size, it would be expensive and difficult to pave before approval and funding. He suggested a provision requiring that it be completed in a certain amount of time and include bonding to ensure it was done.

Steve Schreckengast stated that there should be assurances that it will be done.

Patrick Cunningham stated that before hand might not be the best time to pave it because of all the construction vehicles.

Steve Schreckengast suggested some kind of bonding or letter of credit to ensure it gets done.

Sallie Fahey stated that they could add that bonding was required for all off-site improvements. She pointed out in the worst-case scenario, there could be existing 8 feet wide pavement, followed by a 20 foot wide RE road with side ditches behind it. She asked if that would be acceptable. She mentioned that was not acceptable back in October.

Steve Schreckengast stated that there should be some standards as well as assurances that it will be paved.

Sallie Fahey stated that if there is an RE proposal for an area where the front road is already paved, then it should be allowed. She said that if it is not paved at the time of approval, it should be subject to the condition that it be upgraded to the same standard as the RE road in the back.

James Hawley pointed out that the construction vehicles using it to access the new development in the back could destroy the pavement in the existing development.

Sallie Fahey stated that not finding a solution to this issue would create a lot of great sites that are not useable.

Karl Rutherford stated that it is not the Committee's responsibility to engineer the ordinance to maximize the effect of every developer. He said that the purpose of this was to create language to allow additional areas to be useable. He said that they were getting to the point of losing sight of the original goal.

Patrick Cunningham reminded the Committee that there are a lot of individual landowners and farmers that would be affected by this and not just developers.

James Hawley stated that the ordinance was originally created to open up new ground for an appropriate rural estate development. He said that the intent was not to create new opportunities for areas that had maxed out there development rights.

Steve Schreckengast stated that this is a new document and adjustments should be expected.

Karl Rutherford pointed out that at one time there was a consensus, even though it was not the perfect solution.

Mark Hermodson stated that if Jay Seeger and Sallie Fahey could solve the first problem, the rest should be easy. He said that it might be more productive to talk about the rest of the issues once the first one has been resolved.

Sallie Fahey stated that issue only has to do with who has the legal right to use the land, not the types of improvements that are required.

Mark Hermodson stated that until there is the legal right to use it, it is pointless to discuss it.

Steve Schreckengast asked if the intent was to have the Committee choose between the two options in (h).

Sallie Fahey replied affirmatively.

Steve Schreckengast stated that he preferred the option on page 6.

Mark Hermodson stated that he preferred the first option.

Jack Rhoda stated that he was not prepared to choose one or the other.

Sallie Fahey stated that the Committee should think on those two options while Jay Seeger worked on the first problem. She reviewed changes and additions in section (j). She said that because it is a private road standard, the County Highway Department would not be asking the County Commissioners to adopt it as a standard. She said that it would need to be in our ordinance because it is the only place it would show up. She reviewed changes and additions to sections (iv), (vi), (vii), (k) and Table 1. She read an email from Mark Albers regarding Table 1. She mentioned that Table 1 should be discussed because it would affect all subdivisions not just RE subdivisions.

James Hawley stated that this was part of the revision going into the thoroughfare plan.

Sallie Fahey asked which should be first the subdivision ordinance or the Thoroughfare Plan.

James Hawley stated that it could be done in the subdivision ordinance first.

Steve Schreckengast asked if this was going to be discussed next meeting, because he had questions on it.

Sallie Fahey replied affirmatively.

IV. CITIZEN COMMENTS**V. ADJOURNMENT**

Mark Hermodson moved to adjourn. Karl Rutherford seconded and the motion passed by voice vote.

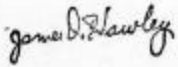
Jan Mills adjourned the meeting at 6:00 p.m.

Respectfully submitted,



Michelle D'Andrea
Recording Secretary

Reviewed by,



James D. Hawley, AICP
Executive Director